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80-5266

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. Whether petitioner, in a trial in which the state sought and obtained the death penalty, was denied due process of law by the trial court's failure to conduct a hearing and make a finding as to his competency to stand trial where the psychiatrists who reported to the court diagnosed petitioner as schizophrenic and were evenly divided in their opinions as to his competency and where there was evidence that petitioner had engaged in bizzare and irrational behavior?

II. Whether petitioner's sentence of death pursuant to a finding of an aggravated circumstance as defined by Ga. Code Ann. § 27-2534.1 (b)(7) without a limiting construction upon the statute by both the trial court in its instructions to the jury and the Georgia Supreme Court in its review of the sentence is violative of the Eighth and Fourteenth Amendments as set forth by this Court in Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759 (1980)?

III. Whether petitioner was denied his Sixth and Fourteenth Amendment rights as construed in Witherspoon v. Illinois when several venirepersons were prematurely excluded for cause upon expressing doubt about whether they could impose a penalty of death without determining whether they could consider the death penalty in this case?

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OPINION BELOW

The decision of the Supreme Court of Georgia is reported at Thomas v. State, ____ Ga. ____, 266 S.E.2d 499 (1980). The opinion is annexed in the Appendix at 1a.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 23, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law..."

This case involves the seventh aggravating circumstance of Georgia's death penalty statute, Ga. Code Ann. § 27-2534.1(b)(7), which provides:

> (7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This case also involves Georgia's statute pertaining to one's competence to stand trial, Ga. Code Ann. § 27-1502, which provides:

> (a) Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury. If the special jury finds the defendant mentally incompetent to stand trial, the court shall retain jurisdiction over the defendant, but shall transfer the defendant to the Department of Human Resources.
>
> (b) Within 90 days after the Department of Human Resources has received actual custody of a person pursuant to subsection (a), such person shall be evaluated and a diagnosis made as to whether the person is presently mentally incompetent to stand trial and if so,

whether there is a substantial probability that the person will attain mental competency to stand trial in the foreseeable future. If the person is found to be mentally competent to stand trial, the department shall immediately report that finding and the reasons therefore to the committing court and the person shall be returned to the court as provided in subsection (e).

(c) If the person is found to be mentally incompetent to stand trial by the Department of Human Resources and there is not a substantial probability that the person will attain competency in the foreseeable future, the department shall report that finding and the reasons therefore to the committing court and the person provided that such person meets the criteria for civil commitment, shall thereupon be civilly committed to a State institution . . . .

. . .

(e) A person who is found by the Department of Human Resources to be mentally competent to stand trial shall be discharged into the custody of a law enforcement officer of the jurisdiction of the court committing such person to the department, . . .

(f) Any person returned to the court as provided in subsection (e) shall again be entitled to file a special plea hereunder.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review a decision of that court affirming his conviction of murder and his sentence of death in the Fulton County Superior Court.

On May 4, 1979, a Fulton County Superior Court Grand Jury returned an indictment against petitioner, a 19 year old black male with a nineth grade education, charging him with the murder of nine year old Dewey Baugus. App. at 7a. Trial commenced in this matter on October 22, 1979, and after hearing the evidence, the jury convicted petitioner of murder on October 24, 1979. That same day, the jury recommended

that petitioner be sentenced to death. On October 25, 1979, the trial court issued an Order of Execution. App. at 51a.

From the outset, there was a question as to the competency of the petitioner to stand trial. Within three weeks of petitioner's indictment, the trial court ordered him examined by the psychiatric staff at Grady Memorial Hospital "for the purpose of determining whether or not he is capable of standing trial and participating in his own defense, and, whether or not Defendant was mentally competent at the time of the alleged offense or offenses." App. at 8a.

The petitioner was first examined pursuant to the Court's order on June 1, 1979, by Dr. Lloyd T. Baccus, M.D., the director of the inpatient psychiatry division of the Psychiatry and Law Service of Grady Memorial Hospital in Atlanta. Dr. Baccus reported to the Court that the petitioner "had no idea of the month or the day," his speech was "characterized by tangential to loose associations," his affect was "markedly flattened" and his mood "depressed." App. at 9a. During the examination, Dr. Baccus reported, the petitioner "became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands." App. at 9a. Because of the petitioner's mental condition, the clinical interview could not be completed and the doctor was unable to elicit any substantial family or personal history. App. at 9a. Dr. Baccus was also unable to offer an opinion as to the petitioner's mental status at the time of the offense because petitioner's "state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense." App. at 9a.

These observations were found by Dr. Baccus to be

"clearly indicative of a diagnosis of schizophrenia." He also reported that the petitioner "did not appear to appreciate his role in the proceedings," was "unable to actively participate in the legal proceedings," and was "so substantially impaired as a result of psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense." App. at 10a.

Upon the basis of Dr. Baccus' report, petitioner entered a special plea of incompetency to stand trial and moved the court to transfer him to the Department of Human Resources for further evaluation.[1/] Prior to court action on this motion, petitioner was examined by Dr. Sheldon B. Cohen, M.D. Dr. Cohen reported in a letter to the trial judge that the petitioner "said that he knew he had done something wrong and wanted to get it over with," although he denied any knowledge of the murder. App. at 11a. Dr. Cohen also found the petitioner unable to provide him with "fundamental, historical information about his mother, four brothers and his work history." App. at 12a. Dr. Cohen, however, could not make a definite diagnosis or state an opinion as to the competency of the petitioner. App. at 12a. On August 10, after observing that "the Defendant may be presently incompetent to participate in his defense," the trial court ordered that petitioner be transferred to the Department of Human Resources. App. at 15a. Upon his transfer, an evaluation of the petitioner was conducted by the forensic services division of the Central State Hospital at Milledgeville, Georgia.

[1/] Petitioner, through counsel, filed this motion on June 25, 1979. App. at 13a.

The Court received a letter dated September 24, 1979, from Dr. Jose M. Delatorre, M.D., the medical director of the forensic services division at Central State. The petitioner was described as follows:

> On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process.

App. at 16a. The letter further stated that petitioner's condition had been diagnosed as "latent schizophrenia," but that he was considered competent to stand trial. The letter did not specify the psychological or personality tests administered to the petitioner, the names and professional qualifications of the personnel who evaluated him, the length of his stay at the hospital, or the length and number of observations of the petitioner by qualified mental health professionals. Beyond the paragraph quoted above, the report did not describe in any detail the mental and emotional makeup of the petitioner, how his emotional and intellectual processes work and their effect on his ability to understand the proceedings and communicate with his attorney, or any additional underlying facts upon which the conclusion as to the petitioner's competency was reached.

Despite the conflicting opinions as to the petitioner's competency and the questions raised by the observations contained in the letters of the three doctors to the court, no evidentiary hearing on competency was ever held. Nor were there any judicial findings as to the competency of petitioner

to stand trial. Prior to trial the prosecutor inquired of defense counsel whether petitioner would be asserting an insanity defense. Transcript of trial [hereinafter "Tr."] 17. While petitioner entered a general plea of not guilty to his charges, trial counsel remarked that he did not want to waive raising the defense later in the proceeding. Id. Without further comment on the issue of petitioner's competence to stand trial, the case proceeded to trial.

On the day that trial was scheduled to begin, petitioner filed a Motion to Strike and Quash Georgia Statute Providing For Death Qualification Voir Dire Question. App. at 18. One of the stated purposes of this motion was to prevent the state from death qualifying the venirepersons during the voir dire. Petitioner based his motion upon the Sixth and Fourteenth Amendments to the United States Constitution and the interpretation of those Amendments by this Court in Witherspoon v. Illinois, 391 U.S. 511 (1968). The trial court denied the motion. Tr. 14-15.

As the voir dire commenced, each venireperson was questioned individually as to his views on the death penalty. Upon each occasion when the state sought to remove a venireperson for cause based solely upon his view toward capital punishment, trial counsel noted his objection.[2/] During this process, several venirepersons were excluded in advance of any showing that they were either unalterably opposed to the death penalty or that such views would prohibit their impartial determination of guilt or innocence.[3/]

2/ Tr. 39, App. at 56, Tr. 75-76, App. at 64-65, Tr. 288, App. at 71.

3/ See citations to the transcript and appendix set out in footnote 2/ above.

At trial, the State presented a circumstantial case. The decedent's mother, Glenda Wilborn, and a playmate, Roosevelt Tysinger, testified that on April 11, 1979, the decedent had accompanied Roosevelt Tysinger to a ball park during the early evening hours. Tr. at 461, 469. On their way home from the field, the two boys parted. This was the last time that Dewey Baugus was seen alive.

The State built its case against petitioner largely upon the testimony of fifteen year old Linda Cook, petitioner's girlfriend, and Enzor Lowe, petitioner's stepfather. Ms. Cook testified that two days after the decedent had disappeared, the petitioner returned to the room they shared with blood on his pants. Tr. at 350.[4/] She stated that petitioner took her to some railroad tracks where he showed her the body of the decedent and claimed he had killed him. Tr. at 352. While they were there, she testified, the petitioner jumped on the body, and then threw it in some bushes. Id. On cross examination, Ms. Cook admitted that she did not report this to the authorities for a week and did so only after she was charged with concealing a death. Tr. at 364-367. She also testified that petitioner had locked her into their room for the week proceeding April 13, leaving her a bucket for her wastes since she had no access to a bathroom. Tr. at 375-377.

Petitioner's stepfather, Enzor Lowe, testified that petitioner had told him on April 13 that he had killed a boy, but that he did not believe petitioner because petitioner was grinning and appeared "high." Tr. at 390.

4/ The pants identified by Ms. Cook as those worn by petitioner were received in evidence. Tr. at 356, 480. Forensic serologist Linda Tilman testified that the blood on the pants was human blood of international blood group B type. Tr. at 464-465. However, no evidence was offered as to the blood type of the decedent.

A medical examiner testified that the cause of death was asphyxiation due to neck trauma. Tr. at 435. He found both postmortem and antemortem injuries to the body. Tr. at 441, 446-447.

The State had served notice of its intention to seek the death penalty on the first day of trial, indicating that it would attempt to prove that petitioner committed the offense under aggravating circumstances, to wit: "The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." Ga. Code Ann. § 27-2534.1(b)(7). App. at 23a. Prior to trial, petitioner filed a motion to quash as unconstitutional the Georgia statutes providing for the imposition of the death penalty, and their application to this case. App. at 21a. Petitioner objected to the validity and application of the aggravating circumstance statute because it allowed the jury subjective discretion in applying the death penalty in violation of Furman v. Georgia, 408 U.S. 238 (1972), and the Eighth and Fourteenth Amendments to the Constitution. He also contended that the absence of an objective standard for finding aggravating circumstances eliminated the ability of the Georgia Supreme Court to review effectively his death sentence as required by Ga. Code Ann.§ 27-2537(f) and the due process clause of the Fourteenth Amendment.

Prior to the penalty phase, petitioner again stated his objection to the lack of an objective standard for finding aggravating circumstances which would permit the imposition of the death penalty:

> I would further reraise my objection to the notice of statutory aggravating circumstances served upon me, and that is 27-2534.1 parenthesis 7, on the grounds that it's vague and has no objective standard to be applied in deciding whether that statutory aggravating circumstance exists.

Tr. at 550, App. at 24a. The Court overruled the objection and in addressing the issue of an aggravating circumstance to the jury, instructed as follows:

> In this case the state contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this state.

Tr. at 565-566, App. at 26a.

While deliberating upon petitioner's sentence, the jury sent a note to the trial court which indicated the jury was weighing the possibility of sentencing petitioner to life imprisonment. The note said: "May you advise us the soonest a person can be released if given a life sentence?" Tr. at 564, App. at 34a. The trial judge responded that he was not permitted to answer the question. The jury's subsequent verdict recommended a death sentence based on a finding that choking and strangling of a nine year old child causing asphyxiation by the defendant was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind. Tr. at 571, App. at 35a.

Petitioner noted a timely appeal of his conviction to the Supreme Court of Georgia. He asserted that the trial court erred in proceeding to trial without resolving the issue of his competency; that the jury was not selected in accordance with the principles set forth in Witherspoon v. Illinois, supra; that the jury was not provided with an objective standard for determining whether aggravating circumstances existed which would permit imposition of the death penalty; and that the evidence did not support the finding that the murder was "outrageously and wantonly vile, horrible and inhuman in that

it involved torture and depravity of mind." Ga. Code Ann. § 27-2534.1(b)(7).

The Georgia Supreme Court affirmed petitioner's conviction. With regard to the competency issue, the Supreme Court held:

> [T]he [trial] court did not find the appellant incompetent to stand trial, but stated . . . that the appellant "may be presently incompetent." The doctors at Central State . . . certified his competency to stand trial. The appellant was returned to Fulton County . . . and proceeded to trial without objection.

Thomas v. State, ____ Ga. ____, 266 S.E.2d 499, 502-03 (1980), App. at 4a-5a.

The Georgia Supreme Court found petitioner's Witherspoon argument equally meritless. Without explaining the scope of its review of the record, the court held:

> It is clear from the voir dire examination that the jurors excused were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings."

266 S.E.2d at 502, App. at 4a.

In reviewing the death sentence, the Georgia Supreme Court upheld the guidance given to the jury, stating, "We have reviewed the trial court's instructions to the jury during the sentencing phase of the trial and find them free of the defects dealt with in Hawes v. State. 240 Ga. 327, 240 S.E.2d 883 [(1977)]; Fleming v. State, 240 Ga. 124, 240 S.E.2d 37 (1977)." 266 S.E.2d at 503, App. at 5a. The court did not elaborate. The Georgia Supreme Court also concluded that "a rational trier of fact was authorized to find beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that in involved torture and depravity of mind. Id.

REASON FOR GRANTING THE WRIT

For the reasons stated in the following section of this petition, petitioner asks this Court to issue a writ of certiorari to review the decision of the Georgia Supreme Court.

I. THE FAILURE OF THE GEORGIA SUPREME COURT TO FIND THAT A DUE PROCESS EVIDENTIARY HEARING WAS REQUIRED BY THE SUBSTANTIAL EVIDENCE OF THE PETITIONER'S INCOMPETENCY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEAL.

Despite information before the trial court which made it abundantly clear that there was a substantial issue as to the petitioner's competency to stand trial, that court failed to conduct an evidentiary hearing and make a determination of petitioner's competency to understand the proceedings against him and properly assist in his own defense.

The question of petitioner's competency arose almost immediately upon his indictment. The trial court received three psychiatric reports before trial which were evenly divided in the opinions they contained as to petitioner's competency. The reports indicated that petitioner suffered from schizophrenia, had difficulty communicating, was at best only "partially oriented," and was of "borderline" intelligence.[5/] On the basis of one opinion by a psychiatrist that petitioner was incompetent to stand trial, a special plea of incompetency was entered. At trial, the court heard evidence of bizzare and irrational behavior on the part of the petitioner in locking his girlfriend in a room for a week, showing her the body of the decedent and

5/ The three reports appear in the appendix to this brief at 9a-12a, and 16a-17a.

then jumping on the body.[6] There was also evidence that petitioner admitted killing the decedent to his stepfather, but he was grinning and appeared "high" when doing so and was not believed.[7]

The Georgia Supreme Court rejected petitioner's assertion that he should not have been tried until resolution of the competency issue, basing its decision on the fact that Central State Hospital "certified" his competency to the court and, apparently, its view that petitioner may have waived the issue by proceeding to trial "without objection." Thomas v. State, 266 S.E.2d 499, 502-03 (1980), App. at 4a-5a. In doing so, the Georgia Supreme Court sanctioned a marked departure from the holdings of this Court, other state courts of last resort, and federal courts of appeal. Therefore, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

This Court has made it clear that "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1975), citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also Bishop v. United States, 350 U.S. 961 (1956) reversing 96 U.S. App. D.C. 117, 120, 223 F.2d 582, 585 (1955). In both Drope and Robinson this Court, although finding that state statutory schemes "jealously

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6/ Tr. at 352, 375-377.

7/ Tr. at 390.

guarded" this right,[8/] reversed convictions because of the failure of trial courts to utilize adequate procedures once a question as to the competency of the defendant was raised. The Court pointed to three factors -- evidence of a defendant's irrational behavior, any medical opinions on competence, and a defendant's demeanor at trial -- as being relevant to determining whether further inquiry is required and stated that "even one of these factors standing alone may, in some circumstances, be sufficient." Drope, supra at 180.

In Robinson, this Court found that a history of irrational behavior was sufficient to warrant an evidentiary hearing despite the stipulated opinion of a psychiatrist that the defendant knew the nature of the charges and could cooperate with his attorney and the fact that he appeared mentally alert during trial. Id. at 385-86. In Drope, this Court held that irrational behavior by the defendant prior to trial, a suicide attempt during trial and the suggestion of a psychiatrist and the defendant's lawyer that he needed psychiatric treatment created a sufficient doubt of his competency to stand trial to require further inquiry by the trial court. 420 U.S. at 180.

Where there is conflicting documentary evidence on the question of competency, an evidentiary hearing is required. In Bishop v. United States, supra, this Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit sustaining a determination of a competency question without a hearing on the information before the trial court,

8/ Robinson, supra at 385, Drope, supra at 173.

including a detailed report of a psychiatrist. See 96 U.S. App. D.C. at 120-121, 223 F.2d at 585-86. In a per curiam decision, this Court vacated the judgment and remanded the case for a hearing on competency. 350 U.S. at 961. In addition, an evidentiary hearing is also necessary, as the Court of Appeals of Oregon has pointed out, to protect other fundamental rights of the accused, such as the rights of cross-examination and confrontation. Brady v. Calloway, 11 Or. App. 30, 36, 501 P.2d 72, 75 (1972).[9/]

Accordingly, state and federal courts have held that an evidentiary hearing is constitutionally required when the information before the trial court is sufficient to raise doubt as to the competency of the defendant to stand trial. Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, ___ U.S. ___, 100 S.Ct. 170 (1979); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Commonwealth v. Hill, 375 N.E.2d 1168 (Mass. 1978); State v.

9/ A trial court cannot delegate its responsibility to the state hospital to "certify" the competency of a defendant. "Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority. . . . " Note, Incompetency to Stand Trial, 81 Harv.L.Rev. 454, 470 (1976). The commentator also points out that "there is repeated evidence that psychiatrists often misunderstand the test of incompetency. . . . Medical opinion about the defendant's condition should be only one of the factors relevant to a determination." Id. [footnotes omitted.]

Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal.2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen, 278 Minn. 212, 153 N.W.2d 339 (1967). Other courts have protected the right to a determination of competency by rigorously enforcing state statutes requiring evidentiary hearings without reaching the constitutional question. See, e.g. People v. Livingston, 57 Mich. App. 726, ___, 226 N.W.2d 704, 709 (1975), where the court reiterated that "the trial judge must announce, on the record, the commencement of a formal evidentiary hearing into the question of competency" regardless of whether a hearing is requested.[10/]

Thus, once the evidence before the trial court is sufficient to raise a reasonable doubt as to competency, the trial court must conduct an evidentiary hearing to resolve the issue.

> [A] due process evidentiary hearing is constitutionally compelled at any time that there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. . . . Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court . . . is not to determine the ultimate issue: Is the defendant competent to stand trial? It [sic] sole function is to decide whether there is

10/ But see also State v. Jemison, 14 Ohio St.2d 47, 236 N.E.2d 538, 540, cert. denied, 393 U.S. 943 (1968), where in interpreting an Ohio statute the court approved of referral to the state hospital to determine the issue of competency without an evidentiary hearing.

> any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. . . .

Moore v. United States, supra at 666. In People v. Pennington, supra, the California Supreme Court held in light of Pate v. Robinson, supra, that its previous interpretation of that state's penal code, which permitted a trial court to resolve conflicting evidence to decide if there was a doubt as to the competency of a defendant, was unconstitutional as applied to a defendant who presented substantial evidence of incompetence. People v. Pennington, supra, 66 Cal.2d at 516-17, 58 Cal. Rptr. at 380, 426 P.2d at 948-49, revising its decision in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1, cert. denied, 361 U.S. 943 (1960).

> [W]hen a defendant has come forward with substantial evidence of present mental incompetence, he is entitled to a . . . hearing as a matter of right under Pate v. Robinson . . . . The judge then has no discretion to exercise. . . .
>
> . . . [O]nce it is determined that a defendant's showing was substantial, it is immaterial that the prosecution's evidence may seem more persuasive. The conflict can only be resolved upon a special trial . . . .

People v. Pennington, supra, 66 Cal.2d at 518-19, 58 Cal. Rptr. at 381, 426 P.2d at 949. The Court found that the opinion of a clinical psychologist that the defendant was incompetent was sufficient to compel a hearing and require reversal of the conviction. Id.

Similarly, in Commonwealth v. Hill, the Supreme Judicial Court of Massachusetts reversed a conviction for

failure to hold an evidentiary hearing as to the defendant's competency, even though defendant was convicted in a bench trial and the trial judge made a specific finding of competency. The Supreme Judicial Court observed that the "record fails to disclose, at any time before making the finding that the defendant was competent to stand trial, the judge had either stated or indicated that was conducting a hearing on that issue, or that he was giving the parties the opportunity to present evidence thereon." Id., 375 N.E.2d at 1174.

The Georgia Supreme Court's approval of the failure to conduct a competency hearing in this case is in conflict with these decisions.[11/] There was not only sufficient evidence to create a reasonable doubt as to the petitioner's competency, there was an even division in the opinions of the experts as to petitioner's competency. The report of Dr. Baccus, standing alone, provided a stronger indication of incompetency than was

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11/ Although Georgia Code § 27-1502(a) provides for a trial on the issue of competency before a "special jury," no such trial was conducted by the trial court below. This was apparently because the prosecution did not object to transfer of the petitioner to the Department of Human Resources, (see petitioner's special plea of incompetency, Appendix at _____, and the court's order transferring petitioner to the department, Appendix at _____,) thereby obviating the need for a finding of incompetency by a special jury to accomplish the transfer as provided in Section 27-1502(a). Subsections (b) and (e) of the statute provide for the return of a person transferred to the Department to the court upon a determination of competency by the Department. Subsection (f) of the statute provides that after return to the court, a person is entitled to again file a special plea of incompetency under the statute.

before the trial courts in either Robinson or Drope.[12] But of course it did not stand alone. One doctor was unable to reach a conclusion as to diagnosis and competency, the report from the state hospital raised serious questions about the mental health of petitioner, and there was evidence at trial of irrational and bizzare behavior on the part of the petitioner.[13] Thus, the Georgia courts have failed to "jealously guard" the petitioner's right not to be tried or convicted while incompetent.

The Georgia Supreme Court's rejection of petitioner's assertions regarding competency also appears to be based upon a finding of waiver due to petitioner's failure to object to trial after his return from Central State Hospital. Even assuming that the Georgia court could properly find waiver despite the special plea of incompetency and the evidence before it, a holding that an incompetent defendant can waive his right to a determination of competency constitutes a significant departure from well established authority to the contrary and should be reviewed by this Court.

12/ In neither Robinson nor Drope did the trial court have before it an expert opinion of incompetency. While in those cases there appeared to be sufficient indicia of mental instability to require further inquiry, here the evenly divided opinions of the psychiatrists who examined petitioner squarely presented an issue for resolution to the trial court.

13/ Indeed, the fact that the trial court entered an order stating that "the defendant may be presently incompetent to participate in his defense" and its transfer of petitioner to the state hospital indicates that the court recognized the substantial evidence of incompetency, and, therefore, it was required to conduct an evidentiary hearing. See, Tillery v. Eyman, 492 F.2d 1056, 1059-60 (9th Cir. 1974) (Sweigert, J. concurring).

In Pate v. Robinson, this Court observed, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id. at 384. In his dissenting opinion in that case, Mr. Justice Harlan pointed out that if there were error on the question of competence "such an error is not 'waived' by failure to raise it . . . . Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers." Id. at 388. (Harlan, J., concurring).

State and federal courts have squarely held that the issue of incompetency was not waived by failure to assert it prior to trial where evidence raising a question as to competency was before the trial court. See, e.g., Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960), where, in a case decided before Robinson, the Court of Appeals held that "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so. . . ."; Commonwealth v. Hill, supra, 375 N.E.2d at 1170, where the Court citing Robinson, reversed a conviction even though the defendant, unlike petitioner, did not assert at any time prior to trial that he was incompetent; Fitch v. Estelle, supra at 776-777; Rhay v. White, supra at 886; State v. Jensen, supra, 278 Minn. at 216-17, 153 N.W.2d at 342; People v. Livingston, supra, 57 Mich. App. at 726, 226 N.W.2d at 709-10.

Therefore, petitioner respectfully submits that in this case the Georgia courts failed to protect his right not to be tried or convicted while incompetent in violation of the due process guarantee of the Fourteenth Amendment. Because of the importance of the departure by the Georgia courts from the authorities cited herein in the context of this death penalty case, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

II. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT RESTS UPON A FINDING OF THE AGGRAVATING CIRCUMSTANCE DEFINED BY GA. CODE ANN. § 27-2534.1 (b)(7), WHICH, AS CONSTRUED AND APPLIED BY THE TRIAL COURT AND BY THE SUPREME COURT OF GEORGIA VIOLATES THE CONSTITUTIONAL REQUIREMENTS FOR CAPITAL SENTENCING ESTABLISHED BY GODFREY V. GEORGIA, ____ U.S. ____, 100 S.CT. 1759, (1980).

A. The Failure of the Trial Court To Instruct the Jury at the Sentencing Phase of Trial with Clear and Objective Standards that Provide Specific and Detailed Guidance in Applying § 27-2534.1 (b)(7) Violated Petitioner's Eighth and Fourteenth Amendment Rights.

In Godfrey v. Georgia, ____U.S.____, 100 S.Ct. 1759 (1980), this Court held that a death sentence based upon a finding of an aggravating circumstance defined by § 27-2534.1 (b)(7) of Ga. Code Ann.[14/] cannot stand consistently with the Eighth and Fourteenth Amendments unless a limiting construction is placed upon § (b)(7) by both the jury instructions and the

14/ § (b)(7): The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

Georgia Supreme Court.[15] Further, the facts of the case must provide fair evidentiary support for a finding that it falls within the constitutionally accepted narrow construction of § (b)(7). This Court held that a limiting definition of § (b)(7) was necessary to distinguish a case in which the death penalty was imposed from the many cases in which it was not.

As in Godfrey, supra, the trial court's charge to the jury, both orally and in writing, merely quoted to the jury the statutory language of the § (b)(7) aggravating circumstance.[16]

15/ In view of the Godfrey decision, this Court has remanded several cases back to the Georgia Supreme Court for reconsideration. Baker v. Georgia, 446 U.S. ____, 100 S.Ct. ____, 64 L.Ed.2d 820 (1980); Brooks v. Georgia, 446 U.S. ____, 100 S.Ct. ____, 64 L.Ed.2d 821 (1980); Collins v. Georgia, 446 U.S. ____, 100 S.Ct. ____, 64 L.Ed.2d 820 (1980); Davis v. Georgia, 446 U.S. ____, 100 S.Ct. ____, 64 L.Ed.2d 819 (1980); Hamilton v. Georgia, 446 U.S. ____, 100 S.Ct. ____, 64 L.Ed.2d 821 (1980); Spraggins v. Georgia, 446 U.S. ____, 100 S.Ct. ____, 64 L.Ed.2d 820 (1980).

16/ The trial court instructed the jury as follows:

> The law of Georgia provides that the death penalty may be imposed in certain cases provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as statutory aggravating circumstance.
>
> In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this state.
>
> If you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances, you may recommend that this defendant be put to death . . . . and you must set forth in writing the aggravated circumstances which you find to exist.

Tr. at 565-569, 597-599, App. at 26a-33a.

The trial court did not instruct the jury on the issue of aggravated battery.

The jury instructions did not attempt to define, delimit or employ a narrowing construction on the statutory language. The instructions did not give the jury any guidance concerning the meaning of any of (b)(7)'s terms. Godfrey also makes clear that the only acceptable limiting definition is one which narrows § (b)(7) so as to require both "evidence of serious physical abuse of the victim before death," 100 S.Ct. at 1766, and a "mental state that . . . led the murderer" to commit such abuse, Id., which must obviously mean that the serious physical abuse was intentionally inflicted. See, e.g. People v. Love, 53 Cal. 2d 843, 856-857, 350 P.2d 705, 711-713 (1960).

Not surprisingly, the jury's verdict was again a mere echo of § (b)(7) when it found that "choking and strangling a 9 year old child asphyxiated by the defendant, was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind."[17/] Jury's sentencing verdict, App. at 35a.

There is nothing in the jury instructions nor in the verdict that implies any restraint on the arbitrary and capricious infliction of the death sentence. Indeed, in explaining why the death penalty imposed in this case was appropriate, the trial judge merely stated in his sentencing report that there was: "Unexplained strangulation of 9-year old child;

17/ The jury did not find an aggravated battery.

brutality to child's corpse."[18/] Report of Trial Judge at 6, App. at 41a.

It is clear that a proper and specific limiting construction must have been charged to the jury at trial. Godfrey makes plain both the purpose of the sentencing standards demanded by Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), is to "channel the sentencer's discretion," 100 S.Ct. at 1764 [emphasis added], and that the constitutional failing found in Godfrey itself was that the sentencer's discretion had not been so channeled because an unlimited view of the statutory language of § (b)(7) "may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer

18/ In another section of the report the trial judge, in answer to the standard question -- "was the victim physically harmed or tortured?" -- replied in the affirmative with the following explanation: "Laceration to head; strangulation marks on neck (causa mortis)." The question and answers are inherently ambigious. If meant to convey whether the victim was physically harmed, obviously the causa mortis explains the injuries. There is no assertion as stated by the trial court's own explanation that the victim was tortured prior to death.

Report of Trial Judge at 6, App. at 41a.

speculation." 100 S.Ct. at 1765.[19/] Unless this vice is cured by proper limiting instructions to the jury at the penalty trial, Godfrey invalidates any death sentence based upon a § (b)(7) finding. A narrowing construction placed upon § (b)(7) by the Georgia Supreme Court on appeal would not cure the deficiency, under established constitutional principles. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965); Presnell v. Georgia, 439 U.S. 14 (1978).

The failure to properly instruct the jury was fundamental. For all that appears of record, the jury may have sentenced petitioner to death for a myriad of reasons -- none of which were related to a proper aggravating circumstance. Without the proper education and guidance from the trial court's instructions, the basis for the jury's verdict is impermissibly open to question and speculation.

19/ There is the distinct possibility that other improper factors may have influenced the jury's verdict under the circumstances. As the trial court's sentencing report indicates, there was extensive publicity in the community concerning the case and yet the jury was not instructed to disregard such publicity. Report of Trial Judge at 6, App. at 41a. Further, although the issue of race was not raised by the defense at trial, racial issues appeared in the trial. Id. Nevertheless, the jury was not instructed to exclude race as an issue. Id. Nor was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence. Id.

B. The Standardless and Unchanneled Discretion of a Basically Uninstructed Jury in This Case Was in No Way Cured by the Affirmance of This Sentence by the Georgia Supreme Court Where the Facts of Record Failed To Disclose Any Serious Physical Abuse or Torture To the Victim Prior To Death or a Concommittant Depravity of Mind in Behalf of the Petitioner.

The Georgia Supreme Court had a duty in light of Furman, supra, Gregg, supra, and Godfrey, supra, to apply a limiting construction upon § (b)(7) in order to channel the sentencer's discretion in its sentencing review on appeal of the case. This is so because the Georgia Supreme Court's review is a constitutionally required safeguard "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (1976), and was relied upon as such by this Court when sustaining the constitutionality of the Georgia statutory procedures in Gregg. Thus the opinion in Godfrey emphasized that the Supreme Court of Georgia had not "applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman in that they involved . . . depravity of mind.'" 100 S.Ct. at 1767. Unless such a construction is employed in the sentencing review conducted by the Georgia Supreme Court, a death sentence based on § (b)(7) cannot stand.

In the instant case, the Georgia Supreme court's failure to place a limiting construction upon § (b)(7) is evidenced by its conslusions of law based on an inadequate factual record.

The facts linking the petitioner to the crime were

purely circumstantial. There was no evidence in the record whatsoever that the victim suffered torture or serious physical abuse prior to death. Ante-mortem bruises on the body were caused by strangulation which was the cause of death. Post-mortem bruises, although cited by the Georgia Supreme Court as indicia of "torture of the most sadistic kind," 266 S.E.2d at 503, App. at 5a, do not constitute evidence of torture and should not be considered as such.[20/] Further, no evidence either circumstantial or forensic, was introduced to suggest rape or child molestation.[21/] Nor was there evidence of a coextensive depravity of mind on the part of the petitioner. The trial judge did not find that the petitioner possessed any specific state of mind at the time of the offense; in fact, the trial court noted in its sentencing report that the strangulation was "unexplained." Report of the Trial Judge at 6, App. at 41a. The petitioner and victim were unacquainted; there was no suggestion of robbery nor was there any scientific or medical evidence

20/ "'Torture' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death." Godfrey v. Georgia, 100 S.Ct. at 1766. [Emphasis added].

21/ Upon discovery of the body one week after the offense, it was discovered that the victim's pants had been partially removed. The record is completely barren of any factual predicate to suggest a sexually motivated offense.

to support an inference of a sexually motivated crime.[22] Nevertheless, the Georgia Supreme Court predicated its affirmance on the sentence of death on two critical facts: upon discovery of the body one week after the offense, the victim's pants were partially removed and evidence adduced at the sentencing phase of trial indicated that petitioner had prior convictions for child molestation and assault with intent to rape. 266 S.E.2d at 503, App. at 5a. The appellate court's reliance on petitioner's prior convictions for non-capital offenses as evidence of his predisposition to not only commit the crime in question, but to commit it with a certain state of mind and in a certain manner is completely speculative and legally impermissible.[23]

The failure of the Georgia Supreme Court to properly place a limiting construction upon § (b)(7) as mandated by Godfrey v. Georgia, supra, in its sentencing review necessitates a reversal and remand of the death sentence imposed in this case.

22/ The only set of factual circumstances that would even remotely support an aggravating circumstance under § (b)(7) would be that method of killing the decedent indicated an aggravated battery. As noted supra, the jury was neither instructed on aggravated battery nor did it so find in its verdict.

23/ It is a principle of long standing that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. See 1 Wigmore Evidence §§ 192-94 (3d ed. 1940); McCormick, Evidence § 157 (2d ed. 1972); 1 Underhill, Criminal Evidence §§ 205-12 (5th ed. 1956); Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

III. PETITIONER'S SENTENCE OF DEATH WAS IMPOSED BY A JURY SELECTED IN CONTRAVENTION OF THE PRINCIPLES ANNOUNCED IN WITHERSPOON V. ILLINOIS.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Adams v. Texas, 48 U.S.L.W. 4869, 4870 (June 25, 1980). In holding that only venirepersons who maintain unalterable views toward the death penalty may be excluded pursuant to due process, the court stated:

> Veniremen cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by State law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death penalty cannot be carried out, even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.

391 U.S. at 522 N.21 [emphasis in original].

Since the announcement of Witherspoon, this Court has repeatedly vacated penalties of death where the record did not unequivocally establish that Witherspoon standards were expressly

satisfied.[24/] Just this past term, the Court struck down a practice which permitted the state to strike a venireperson for cause if he could not pledge that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Adams v. Texas, supra. (Some venirepersons were struck because they indicated the death penalty would affect their deliberations as it would increase the gravity of such deliberations while others were struck because "they were unable positively to state whether or not their deliberations would in any way be affected." 48 U.S.L.W. at 4871. In Boulden v. Holman, 394 U.S. 478 (1969), this Court held that the fact that some venirepersons acknowledged that they held fixed opinions against capital punishment was insufficient to satisfy Witherspoon as such jurors "might nevertheless be perfectly able as a juror to abide by existing law to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." 394 U.S. at 484. And in Davis v. Georgia, 429 U.S. 122 (1976), this Court held that even the exclusion of one venireperson in the absence of a showing that the venireperson was "irrevocably committed, before the trial has begun, to vote against the death

24/ Davis v. Georgia, 429 U.S. 122 (1976); Aiken v. Washington, 403 U.S. 946 (1971); Adams v. Washington, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971); Jaggers v. Kentucky, 403 U.S. 946 (1971); Childs v. North Carolina, 403 U.S. 948 (1971); Quintana v. Texas, 403 U.S. 947 (1971); Tajra v. Illinois, 403 U.S. 947 (1971); Whan v. Texas, 403 U.S. 946 (1971); Speck v. Illinois, 403 U.S. 946 (1971); Mathis v. New Jersey, 403 U.S. 946 (1971); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

penalty regardless of the facts and circumstances that might emerge in the course of the proceedings" rendered the sentence of death unconstitutional. 429 U.S. at 123. It is in light of this historical commitment to the command of Witherspoon that petitioner submits that several venirepersons were wrongfully excluded for cause from his jury.

Early into petitioner's voir dire, venireperson Francis Ogletree was questioned about her views toward capital punishment.[25/] When asked whether she was opposed to the death penalty, she responded in the affirmative, but clearly maintained that she would not automatically exclude its consideration and would consider the evidence of the case. With regard to whether these views would prevent her from making an impartial decision upon guilt or innocence, the simply responded "I'm afraid it would." Over the objection of defense counsel, the trial court excused Mrs. Ogletree from petitioner's venire.

It is clear that Francis Ogletree was not unalterably opposed to the death penalty and her cryptic retort to the impartiality question hardly can be interpreted to mean only that she was certain she would not be impartial. Her response was of the character which this court has found insufficient for Witherspoon purposes on other occasions. See Wilson v. Florida, 403 U.S. 947 (1971) (reversing Wilson v. State, 225 So.2d 321 (Fla. 1969) (scruples "very well might" affect his verdict; "I believe I would have difficulty" in finding defendants guilty if the penalty may be death); Pruett v. Ohio, 403 U.S. 947 (1971)

25/ Tr. at 37-39, App. at 54a-56a.

(reversing State v. Pruett, 18 Ohio St.2d 167, 248 N.E.2d 605 (1969) (scruples "very well might" affect his verdict; "I believe I would refuse to return a verdict of guilty where the penalty was death"). Additionally, she was not asked by the court whether inspite of her views she could follow an instruction that she consider only the evidence presented at trial to determine petitioner's guilt. Because Mrs. Ogletree's exclusion was, in the least, premature, petitioner's rights pursuant to Witherspoon were infringed.

In another instance, the court, over defense objection, struck venireperson Joyce Beachum despite several assurances that she was not irrevocably opposed to the death sentence and could be impartial with regard to petitioner's guilt or innocence. Tr. at 68-76, App. at 57a-65a.

When first asked about her views on the death penalty by the court, Mrs. Beachum responded that she had never thought about it. Upon being asked whether she would automatically vote against imposition of the penalty she stated, "No." She then retorted that her attitude would not prevent her from making an impartial decision upon guilt or innocence.

Not satisfied with these responses, the prosecutor asked a series of questions in the vein of whether Mrs. Beachum could "write out a death sentence on a person." While stating she didn't think she could write it out or help impose it,[26/] she did say she could "consider imposing it" but could not vote

26/ It is not clear what the prosecutor had in mind with the phrase"imposing it" and it is certainly not clear how Mrs. Beachum interpreted it.

for it.

Upon questioning by defense counsel, Mrs. Beachum then simply stated she was conscientiously opposed to capital punishment. Once again the court sought to determine Mrs. Beachum's true attitudes.

Court: . . . is your view of the death penalty such that under no circumstances would you ever vote to impose the death penalty?

Mrs. Beachum: No.

Court: Are you telling me that you can conceive of situations wherein you would vote to impose the death penalty?

Mrs. Beachum: Yes.

Tr. at 72, App. at 61a.

The court then reminded Mrs. Beachum that capital punishment in Georgia meant electrocution and she responded that she understood. And finally, after again being asked the impartiality question, she again responded, "I think I could make a fair judgment." Tr. at 73, App. at 62a.

At this point, the government reasserted its claim that Mrs. Beachum should be struck for cause whereupon defense objection, the court proceeded with further inquiry. Again, Mrs. Beachum asserted that she could impose the death penalty, if it was the last alternative. Finally, in response to the court's question of whether there was any case she could conceive of where she would vote to send someone to the electric chair, she responded, "No."

The court understood this last answer to mean Mrs. Beachum was unalterably opposed to capital punishment ("I know

what she has done. She has said three or four different things, but the last time she said she could not.") Tr. at 75, App. at 64a. Upon the government's motion to strike for cause, the court granted the motion and commented:

> Well, I think, as a matter of fact, I will strike her for cause, and I will have to do that as I understand the law. I agree with you that she is quite ambiguous about it, but when it comes down to talking about sending someone to the electric chair to be executed her ambiguity seems to fade away.

Tr. at 76, App. at 65a. [Emphasis added].

Despite her repeated assurances that she could be impartial and could impose the penalty, the court chose to disregard these clear indicia of Mrs. Beachum's attitude and found her irrevocably opposed to the death penalty on the basis of his last inquiry. Yet the court did not ask her whether she was unalterably opposed to the death sentence during his final questions; he instead asked her whether she could conceive of a case where she would vote for the sentence of execution. In responding no, Mrs. Beachum's inability to immediately provide an example does not necessarily indicate that she could never vote for capital punishment. Indeed, in light of her prior answers, Mrs. Beachum's response can best be interpreted only to mean that at that moment she could not describe a case where she would, without doubt, vote for the sentence of execution.. Whether a juror can dream up a circumstance which would warrant capital punishment is not the question. It is instead whether the attitude of the juror will preempt altogether any consideration of the death penalty or interfere with an impartial determination of guilt or innocence. With regard to these two

inquiries, Mrs. Beachum was clear: she was not irrevocably opposed to the penalty and she could be impartial. The court's striking her for cause thereby offended petitioner's rights pursuant to Witherspoon.

The venireperson next examined after Mrs. Beachum was Eddie Watkins. While he proferred that he was opposed to capital punishment, he clearly indicated "I wouldn't automatically vote against it". Tr. at 77, App. at 66a. While Mr. Watkins did indicate reluctance to sentence one to be electrocuted, he stated that he could be impartial at arriving at guilt or innocence. When the court interpreted Mr. Watkins' reluctance to vote for electrocution as reflecting his inability to consider it in any case, Mr. Watkins indicated that he would not vote for a sentence if it meant electrocution. Immediately after excusing Mr. Watkins, the court remarked that he was going to begin to announce to each group of venirepersons as they waited for voir dire that they would be questioned about the death penalty "so that they can be thinking about that, and don't get hit, maybe, cold." Tr. at 78, App. at 67a. This comment, as it followed Mr. Watkins' contradictory remark, indicates that the court felt Mr. Watkins and earlier jurors might not have fully understood what they were being asked. It goes without saying that if that was the case, then the response of any juror prior to this point in the voir dire is suspect as to its reliability. And certainly, Witherspoon standards cannot be satisfied by an ambigious and unreliable record.

Several other jurors were also struck for cause based upon less than convincing testimony that they would never vote for the death penalty or would not be impartial. Christine Reese

indicated general opposition to the death penalty yet clearly responded to questions from the court that she could consider voting for the death penalty and that her views were not so strong as to prevent her from being fair and impartial. Tr. at 286, App. at 69a. However, when asked by the government whether she could "vote to sentence someone to the electric chair at Reidsville", Ms. Reese simply responded, "No ma'am." Tr. at 288, App. at 71a. Without any further inquiry and over objection, the court excused Ms. Reese.

To say the least, Ms. Reese's excusal was premature. She had stated she could be impartial and would consider the death penalty. It was only in response to the question concerning the electric chair did she indicate that she would not vote for the death penalty. So, at best, the court found her unalterably opposed upon a contradictory record. She was not asked whether she could dutifully follow an instruction that as a juror, she must follow the laws of the State of Georgia which would obligate her to consider imposition of the penalty. The excusal of Christine Reese accordingly violated the dictates of Witherspoon.

Evelyn Thompson exhibited similarly ambivilant yet hardly unalterable views toward the death penalty as did Christine Reese. After first indicating that she was not sure about what capital punishment meant, she indicated that she was opposed to electrocution in the electric chair. Tr. at 113, App. at 72a. When next asked whether she would automatically

vote against imposition of the sentence, she responded with a clear "no". Tr. at 114, App. at 73a. The court then proceeded to determine her ability to be impartial. To this line of questioning, she responded with uncertainty:

> Court: Now, would your attitude toward the death penalty prevent you from making an impartial decision as to the question of guilt or innocence?
>
> Juror: I really don't know, at this point.
>
> Court: . . . Now, I am asking you, would your attitude on capital punishment render you unable to make an impartial decision as to the question of guilt or innocence?
>
> Juror: I'm afraid it would.

Tr. at 114, App. at 73a.

Without further inquiry to examine whether "I'm afraid it would" equalled "I'm positive it would", Mrs. Thompson was, over objection, struck for cause. This amounts to premature exclusion because Witherspoon requires a more thorough determination as to whether a venireperson's views toward capital punishment will prevent an impartial approach to the question of guilt or innocence. See Wilson v. Florida, supra; and Pruett v. Ohio, supra.

In summary, petitioner was denied his Sixth and Fourteenth Amendment rights in that numerous venirepersons were excluded from his jury simply because they expressed varying degrees of doubt about whether they could vote to impose

a sentence of death upon another human being. The Constitution, as interpreted in Witherspoon through Adams v. Texas, permits such exclusion only if the venireperson clearly indicates a total repudiation of the penalty or an unalterable view that such feelings will preclude an impartial decision upon the merits of the case. As this Court has repeatedly stressed the clear parameters of Witherspoon, petitioner prays that this Court grant his petition and summarily reverse his sentence of death.

CONCLUSION

Petitioner prays that a writ issue to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,

Russell F. Canan
George H. Kendall
CANAN, BURNS & O'TOOLE, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 347-5212

Dated August 21, 1980

Stephen B. Bright
635 F Street, N.W.
Washington, D.C. 20004
(202)638-4798

ATTORNEYS FOR PETITIONER

80-5266

RECEIVED
AUG 21 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN
THIS COURT IN FORMA PAUPERIS

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action in forma pauperis. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Court grant this motion.

Respectfully sumbitted,

Russell F. Canan

Russell F. Canan

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October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT OF ATTORNEY IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

I, Russell F. Canan, being first duly sworn, deposes and states that I am the attorney for the petitioner in the above entitled matter, that in support of petitioner's motion to proceed in this action for a writ of certiorari to the Supreme Court of Georgia without being required to prepay fees, costs or give security therefor, I state that because of petitioner's poverty he is unable to pay the costs of said proceeding or to give security therefor.

I further swear that the information stated below regarding the ability of petitioner to pay the costs of proceeding herein are true:

1. The petitioner is not presently employed. He has been incarcerated since May, 1979. Prior to that time,

petitioner, who is 19, had various odd jobs, but no regular employment.

2. Petitioner has received within the past twelve months no income from a business, profession or other form of self-employment. He has received nothing in the form of rent payments, interest, dividends or moneys from any other source.

3. Petitioner has no cash and has no checking or savings account.

4. Petitioner owns no real estate, stocks, bonds, notes, automobiles, or other valuable property excluding ordinary household furnishings and clothing.

5. There are no persons who are dependent upon the petitioner for support.

Russell F. Canan

Russell F. Canan

Subscribed and sworn to before me this 21st day of August, 1980, by Russell F. Canan.

Shirley E. Parker

Notary Public

My Commission expires:

My Commission Expires June 14, 1984

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DONALD WAYNE THOMAS,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

NO. _____

AFFIDAVIT OF POVERTY

I, DONALD WAYNE THOMAS, the above-named Petitioner, do hereby make solemn oath that I am without and cannot obtain the money with which to pay the filing fees, court costs, cost of recording and printing the transcript and other costs in defending this action. I own no property other than personal effects of little or no value.

Donald Wayne Thomas

DONALD WAYNE THOMAS

STATE OF GEORGIA
COUNTY OF FULTON

Sworn to, and subscribed before me,
this the 15th day of May, 1980.

Harriet P. Morris

Notary Public

My Commission expires:

Notary Public, Georgia, State at Large
My Commission Expires June 13, 1982